Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN WELLS, PETITIONER

v.

JAMES R. LAMZ; TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss When the Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act and the Eleventh Amendment Did Not Bar the Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal

II. Whether the Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss Against Defendants Lamz, Thornhill, Thornhill Law Firm, LLC and Committee to Elect Jim Lamz' Motions to Dismiss When There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech and the Actions of the Defendants Constituted State Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is unreported. The decision of the United States District Court for the Eastern District of Louisiana is unreported.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules which govern the review on certiorari. The final judgment of the United States Court of Appeals for the 5th Circuit was entered on November 13, 2006. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does question the constitutionality of R.S. 18:1463 State Legislature. The Louisiana Attorney General was a party in the court below.

RELEVANT PROVISIONS INVOLVED

The following constitutional provisions treaties, statutes, ordinances and regulations are applicable to this proceeding:

U.S. Const. Amnd I
U.S. Const. Amnd V
U.S. Const. Amnd XI
28 U.S.C. § 1291
28 U.S.C. § 1331
28 U.S.C. § 1343
28 U.S.C. § 1367
28 U.S.C. § 2201

42 U.S.C. § 1983
42 U.S.C. § 1988
Louisiana Constitution Article IV § 8
R.S. 18:1463
R.S. 49:251
R.S. 49:252

Pertinent text of citations are set out in the appendix.

STATEMENT

This case goes straight to the heart of political speech. A desperate candidate used an unconstitutional statute to successfully curtail the speech of his opponent. Through the abuse of the judicial process, respondents were able to chill the petitioner's speech and force him off the campaign trail.

Petitioner John B. Wells and respondent James R. E. Lamz were in a closely contested race for the City Judgeship of Slidell, Louisiana. On October 29, 2004, four days before the November 2, 2004 general election, Tom W Thornhill and the Thornhill Law Firm, on behalf of Lamz, maliciously filed a Strategic Lawsuit Against Public Participation (hereinafter SLAPP) against Wells. The suit was brought under Louisiana R.S. 18:1463. The suit sought injunctive relief without hearing, to prevent plaintiff from airing commercials or mailing campaign literature. The suit also sought criminal sanctions against Wells.

On October 29, 2004, the 22nd Judicial District Court for the Parish of St. Tammany denied Lamz' motion for a Temporary Restraining Order. A hearing was set for November 3, 2005, the day after the election.

As a result of the Motion for a Temporary

Restraining Order, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. He was required to travel to Covington to file an opposition and to wait for a hearing by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. As a result of the Motion for a Preliminary Injunction Wells was forced to spend most of the weekend before election preparing an opposition and a Special Motion to Strike, instead of campaigning door to door and passing out flyers at high visibility locations.

On Election Day, November 2, 2004, Wells was declared the winner of the election by forty votes by the electronic and print media. On November 3, 2004, absentee votes discovered in the wee hours of the morning changed the outcome and Lamz was declared the winner by 184 votes out of 35,250 votes cast. Also on November 3, 2004, the 22nd Judicial District Court denied Lamz' motion for a preliminary injunction.

The law suit brought against Wells by Lamz constituted malicious prosecution and an abuse of process under state law. The state court recognized that Lamz could not prevail on the merits and dismissed the SLAPP suit on March 24, 2005. The 22nd Judicial District Court found that the campaign information distributed by Wells was true and consistently verified. A Motion for New Trial was denied on April 4, 2005. Lamz' appeal was also denied. *Lamz v. Wells*, 938 So.2d 792 (La. 1 Cir. 2006).

The court specifically found that the campaign literature published by Wells was true. The state court further found that there was no merit to the criminal charges brought pursuant to R.S. 18:1463. Finally the court noted that Thornhill had exaggerated the

comments made by Wells in his campaign literature.

As a result of the SLAPP suit, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. He was also required to travel to the Parish seat to file an opposition and to wait for a hearing by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. Wells was deprived of sleep the evening of October 28-29 2004 reviewing the petition and preparing a response. He also was forced to spend time preparing an opposition and a Special Motion to Strike instead of campaigning door to door and passing out flyers at high visibility locations on the final weekend before the election.

The United States District Court for the Eastern District of Louisiana dismissed the case against the Attorney General for lack of jurisdiction and further found that the Eleventh Amendment barred the action. The court found that Wells did not have standing to bring the action against any defendants because his First Amendment rights were not sufficiently impaired. The court also found that Lamz, Thornhill, and the other defendants were not state actors. The Court of Appeals for the Fifth Circuit affirmed. After the Fifth Circuit action, Wells abandoned his plans to seek election as a State Representative.

REASONS FOR GRANTING THE PETITION

I The Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss When the Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act and the Eleventh Amendment Did Not Bar the Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal

A. The Court Had Jurisdiction to Hear the Case Under the Declaratory Judgment Act

This Court has repeatedly held that federal court jurisdiction lies under the Declaratory Judgment Act. 28 U.S.C. § 2201. *MedImmune Inc. v. Genenech, Inc.*, 127 S.Ct. 764 (2007); *Perez v. Ledesma*, 401 U.S.82, 130 (1971). Most other Circuits have found jurisdiction under this law, especially when the Constitutionality of a statute is in question. *See, e.g., National Rifle Ass'n of America v. Magaw*, 132 F.3d 272 (6th Cir. 1997). As long as an active case and controversy can be established, as in the instant case, the other Circuits have held that jurisdiction lies. *Volvo Const. Equipment North America, Inc. v. CLM Equipment Company, Inc.* 386 F.3d 581, 592 (4th Cir. 2004); *Goodyear Tire & Rubber Co. v. Releasommers, Inc.*, 824 F.2d 963, 955 (Fed. Cir. 1987).

Federal courts have "original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C.A. § 1331. Furthermore, federal courts have jurisdiction to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right,

privilege, or immunity secured by the Constitution of the United States. . . ." 28 U.S.C.A. § 1343(a)(3). A federal court has the further authority to grant the requested relief under 28 U.S.C. § 1343(3) and attorney fees under 42 U.S.C. § 1988(b).

The suit in this matter was brought under the Declaratory Judgement Act. This Act "expands the scope of available remedies" and permits persons "to seek a declaration of the constitutionality of the disputed government action." Specifically, a pending criminal action is not required to grant a federal court the jurisdiction to review the constitutionality of a state statute. *Steffel v. Thompson* 415 U.S. 452, 462 (1974).

It is well settled that to establish a case or controversy sufficient to give a federal court jurisdiction, Wells had to meet the three criteria outlined by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a plaintiff must show that he has suffered, or is about to suffer, an "injury in fact." Second, "there must be a causal connection between the injury and the conduct complained of." Third, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id.

Wells' complaint was cognizable because it alleged a deprivation of his rights to free speech at the hands of state actors. Additionally, criminal sanctions were sought against him pursuant to R.S. 18:1463. Wells' deprivation of free speech rights constituted real and concrete injury. "It is undisputed that the loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The facts articulated in the Complaint met the first requirement of *Lujan*. Additionally, Wells decided not to seek another office, in part, because of the existence of the statute in question.

Wells also met the second prong of the *Lujan* test. He averred a causal connection between the statute and the abridgement of his right to speak freely without fear of prior restraint or criminal penalties being improperly applied. The existence of the statute allows the State to examine and approve of political speech. With the specter of the statute hanging over his head, Wells' free speech rights were rendered utterly meaningless. As discussed *infra*, R.S. 18:1463 impermissibly restricts Wells' federal First Amendment right of free speech. Wells' protected interest is the clearly established constitutional right to free speech under the First Amendment.

Nor can it be said that the end of the election has terminated the controversy in this matter. It is well settled law that a matter is not moot if it is capable of repetition yet avoiding review. *See, e.g., Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911); *Sibron v. New York*, 392 U.S. 40 (1968); *Roe v. Wade*, 410 U.S. 113, 125 (1973); *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976); *Super Tire' Engineering Corp. v. McCorkle*, 416 U.S. 115, 125 (1974). Thus although the controversy has ended in the state court, it is still ripe under this exception to the mootness doctrine. Additionally, it is also well settled that the chilling effect of prosecution upon the exercise of free speech may provide a controversy even if prosecution is not ongoing. *Dombrowski v. Pfister*, 380 U.S. 479 486 (1965); *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969). Even the threat of sanctions may deter almost as potently as the actual application of sanctions. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Here there has been more than a mere threat - there was an actual attempt to prosecute Wells. The court's refusal to consider the

constitutionality of R.S. 18:1463 was a factor in Wells' decision to reconsider his candidacy for State Representative. As in *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975) this Court should not leave Wells and other candidates to operate in the shadow of civil and criminal sanctions of a statute whose constitutionality is in serious doubt.

Wells has also met the reasonableness standard articulated by *New Hampshire Right to Life Political Action Committee v. Gardner*, 99 F.3d 8 (1st Cir. 1996) and other jurisprudence addressing First Amendment challenges to state criminal statutes. Given the fact that the controversy is ongoing and an attempt at imposing criminal sanctions has been made, there can be no question that his fear is eminently reasonable.

Favorable action ruling the statute unconstitutional will resolve the matter completely. Without such an intrusive unconstitutional statute, the State will be unable to act as a censor of political speech. Wells and other political candidates would no longer have to fear the State acting as a filter for their campaign literature or sanctioning them for statements that the Attorney General does not like.

B. The Attorney General Was a Proper Party

The court below found that Foti could not enforce the challenged statute. That was clear error. Louisiana law merely regulates the Attorney General's ability to bring a criminal prosecution. It does not eliminate it. *State v. Neyrey*, 341 So.2d 319 (La. 1976). As noted by the *Neyrey*, court, the Attorney General may act with the district attorney's permission or judicial authorization. Article IV § 8 of the Louisiana

Constitution. The Attorney General can institute prosecution under two sections of this Constitutional provision. He has done so engaging in many Hurricane Katrina related prosecutions.

The Louisiana Legislature has contemplated the Attorney General's involvement in criminal prosecutions by requiring him to provide a biennial report on civil suits and criminal prosecutions that he is involved with. R.S. 49:252. Additionally, the Attorney General is empowered to issue opinions concerning the state of the law. R.S. 49:251. The Attorney General can advise district attorneys as to the applicability and constitutionality of state law. Notably, the Attorney General has already issued opinions concerning R.S. 18:1463.

Finally, the Louisiana Legislature has dictated that in state court actions concerning the constitutionality of a state statute, the Attorney General must be a party. The rules of this Court require the state Attorney General to be served in matters dealing with the Constitutionality of a state statute.

B. The Statute Chilled Appellants First Amendment Rights

The court below, in direct contravention of the holdings of this Court, found that the interference with Wells' First Amendment rights was not of constitutional dimension. That decision flies in the face of settled First Amendment law. As delineated in *Elrod v. Burns*, *supra.*, even the minimal loss of First Amendment freedoms causes irreparable harm. "Direct restrictions on the content of candidate speech are simply beyond the power of government to impose." *Republican Party v. White*, 536 U.S. 765, 793 (2002)(Kennedy, J., concurring).

Content-based restrictions are presumptively invalid, *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992), and must be subjected to the most exacting scrutiny. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Under the strict scrutiny standard, the State has the burden of proving (1) that the restriction is necessary to serve a compelling state interest and (2) that it is narrowly drawn to achieve that end. *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

The statute simply cannot survive strict scrutiny.

Despite the statutory language, which facially claims a compelling interest, one does not exist. There is no legitimate state interest in silencing a political candidate. In *State v. Burgess*, 543 So.2d 1332 (La.1989) the Louisiana Supreme Court analyzed the statute and found:

> the term "false" as used by the legislature does not conform to the constitutional standard and includes protected speech. In addition, the terms "scurrilous" and "irresponsible adverse comment" are so broad as to include both true speech and protected false speech about a candidate. Moreover, we find it particularly disturbing that this statute applies to "scurrilous, false, or irresponsible adverse comment" concerning "a proposition to be submitted to the voters." By impacting on the discussion of issues before the voters, this section of the statute comes close to regulating "pure speech," which is entitled to "comprehensive protection under the First Amendment."

Burgess, 543 So.2d at 1335.

Unfortunately, the *Burgess* court did not address

the enforcement provisions of 18:1463(D) and (E) which remain "good" law.[1] *Burgess* is important, however, because under its teachings the statute cannot meet the compelling interest prong of the strict scrutiny standard. *Burgess* also points out that the statute is not "narrowly tailored" in that it includes both true and protected false speech. Noting that the "actual malice" standard applies, the *Burgess* court went on to find 18:1463(B) and (C) unconstitutional.

The application of the statute to Wells was based, at least in part on the campaign pamphlets and leaflets that he produced. In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), this Court held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. The Court noted that pamphlets and leaflets "have been historic weapons in the defense of liberty" and allowing the ordinance to stand "would restore the system of license and censorship in its baldest form." *Lovell*, 303 U.S. at 452. Effectively, that is what the current statute does. It allows the State and even the campaign opponents, to license and censor a candidate's political speech. In that respect, this case is similar to *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2794 (2004) where the enforcement of a statute was enjoined because of the potential chill upon protected speech. As a result of this statute, speakers may self-censor rather than risk the perils of trial under an unconscionable law.

This Court has also held that when a statute "effectively suppresses a large amount of speech that

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[1] *Burgess* addressed only R.S. 18:1463(B) and (C) which has since been amended by the Legislature. *Burgess*, 543 So.2d at 1334. The present language has not yet been ruled unconstitutional.

adults have a constitutional right to receive and to address to one another ... [it] is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Ashcroft*, 124 S. Ct. at 2791. *Reno v. A.C.M.R.* 521 U.S. 844, 874 (1997). Consequently, the strict scrutiny standard must be applied to R.S. 18:1463. As discussed herein, the statute cannot meet either prong of that standard and should be declared unconstitutional under the federal Constitution.

The statute also allows for prior restraint on political speech. Prior restraint on speech is presumptively invalid and may be sustained only under the most extraordinary circumstances. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Schneider v. State*, 308 U.S. 147 (1939); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).This Court has noted that there is a potential for particularly great damage if the prior restraint affects the commentary on current events. *Nebraska Press Ass'n v. Stuart supra.*, 427 U.S. 539 at 559. Certainly of all political speech, true political speech must be the most important speech of all and deserving of the highest protection. If this Court does not require the district court to consider the issue, unscrupulous candidates can continue to present a clear and present danger to the electoral system and future campaigns.

The statute in question also provides criminal sanctions, both fine and imprisonment, for its purported violation. It is well settled that the potential for criminal prosecution under a statute regulating expression usually inhibits the full exercise of First Amendment freedoms. *Dombrowski*, *supra.* 380 U.S. at 486. The potential victim or defendant is not required to exercise his rights prior to court action. *Id.* The mere threat of

criminal sanction may deter protected speech. *NAACP v. Button, supra*, 371 U.S. at 433. This Court has recently noted that the threat of prosecution may chill protected speech. *Multimedia Holdings Corp. v. Circuit Court of Florida, St. Johns County* 125 S.Ct. 1624, 1626 (2005). This Court has also noted that "the criminal prohibition of speech which by inference can be taken to support a candidate . . . must in itself chill speech on public issues." *Austin v. Michigan Chamber of Commerce* 494 U.S. 652, 701 (1990).

If a federal court does not have jurisdiction to consider this case, then our freedom and the American republic itself will be dis-served. The courts must be ever vigilant to guard against attacks on our civil liberties. As our military guards our shores, the federal courts must guard our political process to ensure that neither the enemies within or without are successful in assailing its ramparts.

D. The Eleventh Amendment Did Not Bar the Action

In contrast to the holdings of the courts below, suits against state officers seeking declaratory relief are not barred by the Eleventh Amendment. *Ex Parte Young*, 209 U.S. 123 (1908). The *Ex parte Young* exception to the doctrine of state sovereign immunity is based in part on the premise that sovereign immunity bars relief against States and their officers in both state and federal courts, and that certain suits for declaratory or injunctive relief against state officers *must therefore be permitted* if the Constitution is to remain the supreme law of the land. *Alden v. Maine*, 527 U.S. 706, 747 (1999) (emphasis added). An 11th Amendment bar against suits brought against state officers could prevent the

enforcement of rights enumerated by the federal Constitution. *Id.*

Ex Parte Young stands for the firm proposition that the Eleventh Amendment immunity does not always apply. In *Young*, the Court held that enforcement of an unconstitutional law is not an official act because a state can not confer authority on its officers to violate the Constitution or federal law.

The court below has adopted the holding of *Children's Healthcare Is a Legal Duty, Inc.* v. *Deters*, 92 F.3d 1412 (6th Cir. 1996) for the proposition that *Ex Parte Young*, 209 U.S. 123 (1908) does not apply in criminal matters. That Sixth Circuit decision stands alone in support of the Attorney General's argument. The Eleventh Circuit has refused to follow *Deters*. *Summit Medical Associates, P.C. v. Pryor* 180 F.3d 1326, 1340 (11th Cir. 1999). The Ninth Circuit has similarly distinguished *Deters*. *National Audubon Society, Inc. v. Davis* 307 F.3d 835, 846 -847 (9th Cir. 2002). In the instant case, unlike *Deters*, sufficient connection exists between the Attorney General and the statute. The "compelling" state interest cited by the Legislature invokes the Louisiana Attorney General's civil authority. The criminal enforcement provisions allow him to intervene when requested by the district attorney or on his own initiative with the permission of the court. Finally, he has already established a firm connection with the statute by issuing Attorney General's opinions. Thus this case is unlike *Deters* and *Sherman v. Community Consol. School District 21 of Wheeling*, 980 F.2d 437 (7th Cir. 1992) because the Louisiana Attorney General can play a role in the enforcement of this statute. More importantly, unlike the situation in *Deters* and *Sherman*, the threat of harm exists because an action has been initiated.

Nevertheless, the Fifth Circuit's implicit adoption of *Deters* has caused a split in the Circuits that must be addressed and resolved by this Court.

II. The Fifth Circuit Erred in Affirming the District Court's Motion to Dismiss Against Defendants Lamz, Thornhill, Thornhill Law Firm , LLC and Committee to Elect Jim Lamz' Motions to Dismiss When There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech and the Actions of the Defendants Constituted State Action, in Contravention of This Court's Precedent and the Holdings of Other Circuit Courts of Appeal.

A. There Was a Deprivation of the Plaintiff's First Amendment Right to Freedom of Speech

The court below found improperly that there was no deprivation of a protected constitutional right. This is in direct contravention of the holdings of this Court. It is well settled that political speech is a right secured by the Constitution. Furthermore, the First Amendment "has its fullest and most urgent application" to speech uttered during a political campaign. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Without question, the free exchange of ideas in a political campaign is at the heart of American constitutional democracy. *Brown v. Hartlage*, 456 U.S. 45, 53 (1982). In the instant case, the state court found that Wells' statements were protected by the First Amendment.

As discussed supra., the potential for criminal sanctions is sufficient, as a matter of law, to establish the

denial of a First Amendment right. *Smith v. People of State of California, supra. Dombrowski v. Pfister supra.*

As discussed above, the actions acted to deprive Wells of his right to speak. The court below, in its ruling, found that Wells could not show that his right to speak was actually restrained. That was not the case.

While Wells was not subject to a restraining order issued by the court the actions of the appellees restrained Wells' speech just as effectively as if he had been muzzled by a court order. As articulated in the complaint at ¶s LX[2] and LXI[3] Wells' speech was suppressed. The fact that the state court restricted the scope of the damage does not mean that no damage occurred.

As a result of the Motion for a Temporary Restraining Order, Wells was forced to cancel a gathering at an intersection planned for October 29, 2004 to pass out flyers. Wells was also forced to travel to Covington to file an opposition and to wait for a hearing

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[2] ¶LX states:
LX.

The actions of defendants Lamz, Thornhill and Thornhill Law Firm, LLC and the Committee to Elect Jim Lamz chilled plaintiff's right to free speech and prevented him from pursuing his campaign as forcefully as he would have otherwise, which along with the other factors delineated herein, resulted in his electoral loss.

[3] ¶LXI states:
LXI.

The actions of defendants Lamz, Thornhill and Thornhill Law Firm, LLC and the Committee to Elect Jim Lamz forced Wells to take additional time from campaigning to respond to the frivolous, malicious, vicious politically motivated lawsuit which prevented him from speaking to the public about his campaign and along with the other factors delineated herein, such as the effect of the false allegations on the electorate, resulted in his electoral loss.

by the Judge. This prevented him from conducting his door to door campaign during the morning and afternoon of October 29, 2004. Finally, because of the Motion for a Preliminary Injunction Wells was forced to spend the weekend before election preparing an opposition and a Special Motion to Strike instead of campaigning door to door and passing out flyers at high visibility locations.

Oddly enough, the district court found that Wells was not deprived of his rights by having to appear in court one day. The court went on to say that under the case law, the loss of one day from the campaign trail was not sufficient constitutional deprivation. Additionally, as delineated *supra*, there was more than one lost day. Wells spent many hours preparing responsive briefs in the last days preceding the election. Thus he suffered more than one lost day in court.

Accordingly, the court below erred. Wells suffered a harm of Constitutional dimension and the district court should not have dismissed the Complaint. The Fifth Circuit's affirmance was also error.

B. The Actions of the Defendants Constituted State Action

The district court below found that state action was a "close call" but still erred in finding no state action. In affirming the district court, the Fifth Circuit disregarded the guidance provided by this Court.

The statutory requirement of action "under color of state law" and the "state action" requirement of Fourteenth Amendment are identical. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 929-930 (1982). Conduct is fairly attributable to a state where: (1) it is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by

the State or by a person for whom the State is responsible;" and (2) where the party charged with the deprivation is a person who may "fairly be said to be a state actor." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). The first prong of this test is met on the face of the petition and amended petitions filed in State court since it is undisputed that the State created R.S. 18:1463 and that defendants based their suit on that provision of the law.

In meeting the second prong, the defendants must be shown to have performed an action where the challenged conduct may be "fairly attributable to the State." *Lugar*, 457 U.S. at 937. *Lugar* provides three tests - any one of which can be used to meet this requirement. The court below only addressed one in its ruling.

Under the public function test, a "private entity may be deemed a state actor when that entity performs a function which is traditionally the exclusive province of the state." *See Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir.1989). Here the defendants entered an area exclusively left to the state - the filing of criminal charges and the request for criminal sanctions.

Liability also lies under the state compulsion test which provides that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Here the State granted defendants a private right of action under 18:1463D(1). This was more than mere acquiescence. It was overt encouragement. The provision for attorneys fees found in R.S. 18:1463D(2) represents further encouragement. Defendants used this provision of the

law to try to deprive the plaintiff of a federally protected right by petitioning for a Temporary Restraining Order without hearing or bond. They actively limited plaintiff's ability to speak by forcing him to respond to the motion and travel to Covington to force a hearing. Thus the State provided an avenue and encouragement for defendants assault on the plaintiff's right to political speech.

In the third *Lugar* test, the nexus or joint action test, state action may be found where the government has insinuated itself into a position of interdependence that it was a joint participant in the enterprise. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). Again, the instant case meets this test. Here the state offered an avenue via 18:1463D and provided the use of their courts to enforce that avenue. When defendants filed their petition, they brought the court system into joint participation since only the court could issue the injunctive relief or award criminal sanctions and/or attorney's fees. *Shelley v. Kramer*, 334 U.S. (1948). In *Stevens v. Frick*, 372 F.2d 378 (2d. Cir. 1967), the Second Circuit noted that *Shelley* does not apply if the court merely offered a forum for litigation. Unlike the instant case, however, in *Stevens* there was no state statute which authorized the unconstitutional imposition of restraint on a First Amendment right. *Id.* at 381. The Legislature's enactment of this improper restraint distinguished this case from *Stevens* and is sufficient to trigger *Shelley*. The Fifth Circuit's rejection constitutes a split with the Second Circuit that should be resolved by this Court.

Had a Temporary Restraining Order (TRO) been issued there would certainly have been state action under *Lugar*. While no TRO was issued, a state judge did issue a order setting a hearing on the preliminary

injunction. The hearing date was November 3rd, the day after the election. Consequently, Wells was forced to respond to that hearing date. Had no hearing date been set or if it has been set ten days hence, as allowed by the statute, so as not to interfere with the campaign, the state action claim might have been weaker. That was not the case. The action of the state Judge forced Wells off the campaign trail to prepare for the hearing. The district court noted that a Judge would have to do something, even something innocent to trigger state action under the third pong of the *Lugar* test. Scheduling the hearing was sufficient to meet that requirement. While it might have been an innocent act, it was sufficient to trigger state action.

Additionally, Thornhill, by virtue of his status as an officer of the court pursuant to La. Code of Civil Procedure art. 371, is also a state actor in his own right. Art. 371 legislatively makes an attorney a state official.

In the instant case, the Complaint articulates personal action by Thornhill and his law firm to take action to deprive plaintiff of his Fifth Amendment right to due process and his right to free speech. The eventual dismissal in this case is of no moment since Wells had to halt political speech to contest the illegal actions of the defendants. The actions also chilled Wells' right to free speech because the prospect of money damages and criminal sanctions remained even after the injunctive relief was denied. The denial of injunctive relief, in itself, came only after the election and after the plaintiff was forced to spend many hours contesting the issue, at the expense of his right to free speech. Given Wells' momentum, he could have easily swayed 185 voters in the time he spent fighting this action.

Attorneys, even absent a state officer statute such as art. 371, have been found to be state actors when

they participate in a conspiracy to deprive plaintiffs of federal rights. *Tower v. Glover*, 467 U.S. 914 (1984). This is a significant limitation on *Polk County v. Dodson*, 454 U.S. 312 (1981), which had held that a public defender is not a state actor when performing traditional functions. In the instant case, Thornhill and his firm were not performing traditional attorney functions when they tried to turn themselves into private District Attorneys and private Attorney Generals by seeking criminal sanctions. This was more than the malpractice that was at issue in *Dennis v. Sparks*, 449 U.S. 24 (1980). It was an overt act to deprive Wells of his constitutional right to free speech under the color of state law. Notably, this Court further restricted the *Dodson* holding in *West v. Atkins*, 487 U.S. 42 (1988), noting that professionals are not exempt from suits under § 1983, just by virtue of being a professional. *Id.* at 51.

Here Thornhill and his law firm engaged in a conspiracy with Lamz and his committee, to usurp the United States Constitution by improperly seeking injunctive relief and criminal sanctions for the purpose of depriving Wells of federally protected rights. Consequently Thornhill and the Thornhill Law Firm, LLC meet the *Lugar* definition of state actors.

As discussed *infra*, this Court has indicated that the pursuit of an action under an unconstitutional statute is sufficient to trigger state action. This Court has held that a private party and his attorney can be liable under § 1983 for an action brought under an unconstitutional statute. *Wyatt v. Cole*, 504 U.S. 158 (1992). When, as here, the private party takes advantage of a private right of action created by the State, they can be found to be state actors. *Id.* at 161-62. On remand, the Fifth Circuit found that because the defendants and their attorney had invoked a private right in an

unconstitutional statute, they were liable under the "joint participation" prong of the *Lugar* test. *Wyatt v. Cole*, 994 F.2d 1113, 1117 (5th Cir. 1993). *See also*, *Lugar*, 457 U.S. at 941. When a plaintiff challenges the constitutionality of a statute the private party that sets the scheme in motion is a state actor. *Folsom Investment Co. v. Moore*, 681 F.2d 1032, 1037 (5th Cir. 1982). In the instant case, plaintiff has challenged the constitutionality of R.S. 18:1463(D) and (E), the provisions invoked by Thornhill and his firm in the state court petition.

Consequently, the defendants' conduct meets all three of the *Lugar tests* and they are considered state actors under § 1983.

CONCLUSION

For the reasons delineated herein, petition prays that a writ of certiorari be issued to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

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No. 05-30810

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN WELLS,

Plaintiff - Appellant,

versus

JAMES R. LAMZ; TOM W. THORNHILL; COMMITTEE TO ELECT JIM LAMZ; THORNHILL LAW FIRM, LLC; CHARLES C. FOTI, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,

Defendants - Appellees.

November 13, 2006, Filed

NOTICE: RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before BARKSDALE, DeMOSS, and PRADO, Circuit Judges.

OPINION: PER CURIAM: *

AFFIRMED. *See* 5TH CIR. R. 47.6.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.

CIVIL ACTION NO.05-1500

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

JOHN B. WELLS

VERSUS

JAMES R.E. LAMZ, ET AL.

JUDGMENT

Considering the foregoing order,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of James Lamz, Tom Thornhill, Thornhill Law Firm, LLC, Committee to Elect Jim Lamz, Charles Foti, Attorney General of Louisiana, dismissing plaintiff's federal law claims with prejudice and dismissing plaintiff's state law claims without prejudice, with each party to bear its/his own costs. New Orleans, Louisiana, this 13th day of July, 2005.

STANWOOD DUVAL JR.
UNITED STATES DISTRICT JUDGE

U.S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

28 USC § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have

jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 USC § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 USC § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of

any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section—

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 USC § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have

supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 USC § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature,

in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

Louisiana Constitution Article IV § 8

There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a

term of four years at the state general election. The assistant attorneys general shall be appointed by the attorney general to serve at his pleasure.

As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.

The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

R.S. 18:1463

Political material; ethics; prohibitions

A. The Legislature of Louisiana finds that the state has a compelling interest in taking every necessary step to assure that all elections are held in a fair and ethical manner and finds that an election cannot be held in a fair and ethical manner when any candidate or other person is allowed to print or distribute any material which falsely alleges that a candidate is supported by or affiliated with another candidate, group of candidates, or other person, or a political faction, or to publish statements that make scurrilous, false, or irresponsible adverse comments

about a candidate or a proposition. The legislature further finds that the state has a compelling interest to protect the electoral process and that the people have an interest in knowing the identity of each candidate whose number appears on a sample ballot in order to be fully informed and to exercise their right to vote for a candidate of their choice. The legislature further finds that it is essential to the protection of the electoral process that the people be able to know who is responsible for publications in order to more properly evaluate the statements contained in them and to informatively exercise their right to vote. The legislature further finds that it is essential to the protection of the electoral process to prohibit misrepresentation that a person, committee, or organization speaks, writes, or acts on behalf of a candidate, political committee, or political party, or an agent or employee thereof.

B. (1) No person shall cause to be printed or assist in the distribution, transportation, or transmission by any means of any facsimile of an official ballot or cause to be printed, distributed, transported, or transmitted any unofficial sample ballot with the number of a candidate unless the name of the candidate to whom the ballot number was assigned is correctly listed on the ballot.

(2) No person shall cause to be printed or assist in the distribution, transportation, or transmission by any means of any facsimile of an official ballot, or cause to be printed, distributed, transported, or transmitted any unofficial sample ballot containing a photograph, or likeness of any person which falsely alleges, with an intent to misrepresent, that any person or candidate, or

group of candidates in an election is endorsed by or supported by another candidate, group of candidates or other person.

C. (1) No person shall cause to be distributed, or transmitted, any oral, visual, or written material containing any statement which he knows or should be reasonably expected to know makes a false statement about a candidate for election in a primary or general election or about a proposition to be submitted to the voters.

(2) Paragraphs (1) and (3) of this Subsection shall not apply to:

(a) Statements which merely express support for or opposition to a candidate or proposition.

(b) Statements on bumper stickers, lapel pins and stickers, lawn signs, hat bands, badges, ribbons, or to balloons, matchbooks, pens, pencils, and similar paraphernalia.

(c) Radio and television broadcasters who broadcast paid political announcements or paid advertisements that include the voice or picture of a candidate for public office.

(3) If an individual, association, organization, committee, or corporation is responsible for or causes the distribution or transmission of any statements relative to candidates or propositions which do not fully disclose the name of the individual or the name of the association, organization, committee, or corporation, and the full and correct name and address of its

chairman or other chief administrative officer and whether or not such individual, association, organization, committee, or corporation supports or opposes such candidate or proposition, such individual, association, organization, committee, or corporation shall report all expenditures incurred in relation to the publication, distribution, transportation, or transmission in accordance with R.S. 18:1491.7, 1495.5, or 1501.1.

(4)(a) No person shall misrepresent himself or any committee or organization under his control as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof.

(b) No person shall willfully and knowingly participate in or conspire to participate in a plan, scheme, or design to misrepresent himself or any committee or organization under his control or under the control of any other participant in the plan, scheme, or design as speaking, writing, or otherwise acting for or on behalf of any candidate, political committee, or political party, or any employee or agent thereof.

(c) A radio or television broadcaster who broadcasts a paid political announcement or advertisement, the content of which the broadcaster had no input in or control over, is not subject to the provisions of this Paragraph.

D. (1) An affected candidate or voter shall be entitled to an injunction to restrain future violations of Subsections B and C of this Section.

(2) In the event a permanent injunction is granted, reasonable attorney fees shall be allowed the petitioner by the court which shall be taxed as costs to be paid by the defendant.

E. Whoever violates any provision of this Section may be punished by a fine not to exceed five hundred dollars or be imprisoned for not more than six months, or both.

R.S. 49:251

A. The attorney general shall give his opinion in writing upon all questions of law when required by the governor, the state auditor, or the state treasurer. He shall consult with and advise the district attorneys on all matters pertaining to the duties of their offices whenever requested by them.

B. The attorney general shall, within thirty days of receipt of a request, give his opinion in writing upon all questions of law when requested by any state board, agency, or commission or by any political subdivision pursuant to Subsection C, except parish and municipal governing authorities.

C. A state board, agency, commission or political subdivision, except parish and municipal governing authorities, shall request an opinion of the attorney general whenever its counsel advises that the public bid law of this state is not applicable to the particular state board, agency, commission, or political subdivision, except parish and municipal governing authorities. No state board, agency, commission, or political subdivision, except parish and municipal

governing authorities, shall act in accordance with its attorney's advice that the public bid law of the state is not applicable to the particular body until an attorney general's opinion is rendered and received.

R.S. 49:252

The Attorney General shall report to the legislature at the commencement of each regular session convening in even numbered years on all official business done by him during the preceding biennium. He shall specify the suits and prosecutions at which he attended, the number of persons prosecuted, the crimes for which and the parishes in which the prosecutions were had, the results thereof, and the punishments imposed.

He shall include in his biennial report an abstract of the annual reports of the several district attorneys, with such observations and statements as in his opinion the criminal jurisprudence and the proper and economical administration of the criminal law of the state shall warrant.